INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1200

WALTER S. HELLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 34–58) are reported at 2 T. C. 371. The opinion of the circuit court of appeals (R. 165–170) is reported at 147 F. 2d 376.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 27, 1945 (R. 171). The petition for a writ of certiorari was filed on April 25, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in affirming the Tax Court, which held that a series of transactions resulting in the transfer of the business and assets of a Delaware corporation to a California corporation amounted to a tax-free reorganization within the meaning of Section 112 (b) (3) and (g) (1) of the Revenue Act of 1936, so that no loss shall be recognized.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 112. RECOGNITION OF GAIN OR LOSS.
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> * * * * *
>
> (b) *Exchanges Solely in Kind.*—
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> * * * * *
>
> (3) *Stock for stock on reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.
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> * * * * *
>
> (g) *Definition of Reorganization.*—As used in this section and section 113—
>
> (1) [as amended by Section 213 (g) of the Revenue Act of 1939, c. 247, 53 Stat. 862] The term "reorganization" means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation, in exchange solely for all or a part of its voting

stock, of substantially all the properties of another corporation, but in determining whether the exchange is solely for voting stock the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded; or the acquisition by one corporation in exchange solely for all or a part of its voting stock of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation, or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its shareholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another.

* * * * *

STATEMENT

To the extent relevant to the issue raised by the taxpayer's petition, the facts as stipulated (R. 89–90, 91, 108–109, 125–142) and as found by the Tax Court (R. 39–51) may be summarized as follows:

On January 1, 1927, Heller, Bruce & Company was incorporated under Delaware law, as successor to a partnership previously conducted in California under the same name. At all times, the principal officers of the corporation were Walter S. Heller (petitioner herein), president, Harry A. Bruce, vice president, and Edith C. French, secretary and treasurer. These three individuals were also the directors and sole stockholders. (R. 39–41.)

On December 6, 1937, Heller, Bruce and Company was organized under the laws of California. The name of the corporation was changed on December 28, 1937, to Heller, Bruce & Company. At the first meeting of the board of directors of the California corporation held on December 7, 1937, the president announced that the California corporation had been organized for the purpose of acquiring and carrying on the business of the Delaware corporation. (R. 41.)

On December 15, 1937, the petitioner borrowed from the Wells Fargo Bank & Union Trust Company the sum of $200,000, executing promissory notes therefor and depositing securities as collateral. On the same day he drew checks totaling $195,355, payable to the order of the California corporation, Edith C. French drew a check for $100, and Harry A. Bruce drew a check for $6,045. All of the checks, aggregating $201,500, were deposited on December 15, 1937, in an account to the credit of the California corporation in the Wells Fargo

Bank & Union Trust Company. (R. 43–44.) The checks were received by the California corporation in payment of its stock, as follows (R. 43):

Stockholders	Preferred		Common	
	Shares	Percent	Shares	Percent
Walter S. Heller	1,939	96.95	1,455	97
Harry A. Bruce	60	3.00	45	3
E. C. French	1	.05	None	None
Total	2,000	100	1,500	100

However, the corporation issued 1,500 shares of its common stock and 2,000 shares of its preferred stock to the petitioner on December 15, 1937, and the corporation did not issue its stock in the above amounts and proportions until January 20, 1938, when the petitioner surrendered his stock certificates and others were issued by the corporation. (R. 42–43.)

On December 15, 1937, the directors of the California corporation adopted a resolution authorizing the purchase of the assets of the Delaware corporation at book value, less liabilities, for the total sum of $681,741.41 (R. 44). On the same day, the directors of the Delaware corporation resolved to sell its assets to the California corporation for the price stated and also resolved to liquidate and wind up the affairs of the Delaware corporation and transfer its assets to the stockholders (R. 45).

On December 15, 1937, the Delaware corporation was indebted to Wells Fargo Bank & Union

Trust Company in the amount of $565,000 on demand notes secured by collateral. On December 16, 1937, the California corporation borrowed $565,000 on a note from Wells Fargo Bank & Union Trust Company which was credited to an account in the name of the California corporation. (R. 45.) On the same day the California corporation issued its check in the amount of $681,741.41 to the Delaware corporation for the assets of the Delaware corporation, and the Delaware corporation issued its check to Wells Fargo Bank & Union Trust Company in complete liquidation of its debt of $565,000. The bank retained the collateral for the discharged Delaware corporation loan as collateral for the California corporation's loan in the same amount. (R. 45–46.)

On December 17, 1937, the Delaware corporation issued its check to the petitioner in the sum of $135,000. This check was endorsed by the petitioner and delivered to Wells Fargo Bank & Union Trust Company in partial payment upon his loan account. (R. 49.)

A certificate of dissolution of the Delaware corporation was issued on December 20, 1937 (R. 49).

On December 24, 1937, the California corporation issued its check to the Delaware corporation in the amount of $23,939.49 for certain remaining assets (R. 49). On the same day the Delaware corporation issued checks to its stockholders as follows (R. 50):

Walter S. Heller	$21,463.66
Harry A. Bruce	6,280.22
E. C. French	62.90

The petitioner endorsed the check issued to him and delivered it to Wells Fargo Bank & Union Trust Company in payment of his loan account (R. 50).

The first directors of the California corporation were dummy directors. After the initial stage the directors and officers of the California corporation were the same persons who had been officers and directors of the Delaware corporation. The business policies of the California corporation were the same as those of the Delaware corporation and the customers of the former were substantially the same as the latter. (R. 51.)

In his income tax return for 1937, the petitioner claimed capital loss deductions totaling $51,488.05, in connection with his disposition during December 1937 of 2,649 shares of the preferred stock of the Delaware corporation (R. 51). The Tax Court held that no gain or loss could be recognized because it resulted from a tax-free reorganization (R. 57), and the circuit court of appeals affirmed (R. 170).

ARGUMENT

Section 112 (b) (3) of the Revenue Act of 1936, *supra*, provides that no gain or loss shall be recognized if stock in a corporation a party to a reorganization is, in pursuance of the plan of reorganization, exchanged solely for stock in another corporation a party to the reorganization.

That is exactly what occurred in this case. The Tax Court treated the series of steps as one transaction and, after reviewing the facts, concluded that (R. 57)—

> The effect of all the steps taken was that petitioner made an exchange of stock of one corporation for stock of another pursuant to a plan of reorganization.

The disposition of the case under the applicable statute is controlled by the ultimate finding quoted above. That finding is of a type stated by this Court to be exclusively within the province of the Tax Court because it turned on the Tax Court's treatment of the several steps as one whole transaction. *Dobson* v. *Commissioner,* 320 U. S. 489, 502, rehearing denied, 321 U. S. 231. There was no question of law for the circuit court of appeals to consider on review and that court did not err in concluding (R. 170) that the Tax Court's finding of fact had warrant in the record.[1] *Commissioner* v. *Court Holding Co.,* No. 581, this Term, decided March 12, 1945; *Commissioner* v. *Scottish American Co.,* 323 U. S. 119; *Commissioner* v. *Wemyss,* No. 629, this Term, decided March 5, 1945; *Choate* v. *Commissioner,* No. 93, this Term, decided January 29, 1945; *Commissioner* v. *Heininger,* 320 U. S. 467; *Dobson* v. *Commissioner, supra.*

[1] The question of the deductibility of certain expenditures was presented to the court below by the Commissioner's cross-appeal, but it is not before this Court.

The petition (pp. 5–7) asserts a conflict between the decision below and *Thornley* v. *Commissioner*, 147 F. 2d 416 (C. C. A. 3). The question in the *Thornley* case was whether the taxpayer's holding period for certain stock was eight or ten years, for the purpose of applying the percentage recognition provisions of Section 117 of the Revenue Act of 1936. The issues in the two cases are not even remotely similar. The fact that the majority of the reviewing court in the *Thornley* case did not feel bound to affirm the decision of the Tax Court [2] does not create a conflict with the present case.

CONCLUSION

The decision below is correct and does not present a conflict. There is no question involved which warrants consideration by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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[2] See, however, the dissenting opinion of Judge Goodrich in the *Thornley* case (p. 423).

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